

PDR



# RULEMAKING ISSUE

February 11, 1988

(Affirmation)

SECY-88-43

For: The Commission

From: William C. Parler  
General Counsel

Subject: PROPOSED FINAL RULE REVISING AGENCY  
PROCEDURES GOVERNING EX PARTE  
COMMUNICATIONS AND SEPARATION OF  
FUNCTIONS

Prior History: SECY-85-328; SECY-86-39

Summary: On March 26, 1986, the Commission published in the Federal Register a proposed rule that would revise its ex parte and separation of functions rules. 51 Fed. Reg. 10393 (1986). The proposed revisions would update the existing rules to incorporate requirements imposed by the Government in the Sunshine Act as it relates to ex parte communications and to allow members of the NRC staff to serve as confidential advisors to the Commission with respect to a contested proceeding so long as those staff members did not act as investigators or litigators in the proceeding. Eleven comments were received on the proposed rule. The attached draft Federal Register notice, which sets forth the Commission's responses to those comments, would adopt a final rule that is substantially unchanged from the proposed rule.

Discussion: As was described in SECY-85-328, the proposed revised ex parte and separation of functions restrictions are designed to serve a number of purposes. Initially, they would make

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88-217-361XA-65pp.

clear the distinction between those communications to or from adjudicatory decisionmakers and their advisors that are restricted as ex parte (i.e., those involving persons outside the agency) and those that are restricted because of separation of functions considerations (i.e., those involving members of the NRC staff). In addition, the rule would complete the process of conforming agency regulations with the specific terms of the ex parte provision of the Administrative Procedure Act, 5 U.S.C. § 557(d), which was enacted as part of the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976). Finally, the new regulations would enhance communications between adjudicators and the NRC staff by repealing the present total ban on communications from any member of the NRC staff with respect to contested issues in a formal adjudication. Instead, members of the staff not involved in "investigating" or "litigating" in that proceeding would be permitted to consult privately with the Commissioners and their adjudicatory advisors.

Eleven letters of comment were received on the proposed rule that set forth the views of interested utilities, professional organizations, private counsel, and individual members of the public. Ten of the commenters expressed general support for the revision of the ex parte and separation of functions regulations and provided particular suggested revisions. One commenter expressed total dissatisfaction with the proposed separation of functions rule based upon an apparent misunderstanding of the rule's provisions. The attached proposed Federal Register notice contains a detailed discussion of the various comments. (Attachment 1) We also have attached a line-in, line-out version of the final rule showing the changes that were made to the text of the regulations. (Attachment 2)

The following were the major issues of concern as expressed by the commenters:

### 1. Definition of "Relevant to the Merits"

In its notice of proposed rulemaking, the Commission requested comments on the appropriate interpretation of the phrase "relevant to the merits" as it is used in the Administrative Procedure Act to define the subject matter of those communications from or to persons outside the agency that will be considered ex parte. Specifically, the Commission asked for comments on whether the phrase should be interpreted to include (1) any issue that must be considered in a mandatory reactor construction permit proceeding without intervening parties even though the issue is not the object of a dispute between the NRC staff and the applicant and (2) any issue in an operating license proceeding that is raised by a presiding officer sua sponte, see 10 CFR § 2.760a. Of the five commenters who expressed a view on this issue, three indicated that both types of communications should not be considered ex parte because they did not relate to issues put into controversy by the parties to the proceeding. In contrast, two commenters expressed the view that private communications between a person outside the agency and an adjudicatory employee should not be permitted with respect to any substantive issue that is considered in a proceeding, whether that consideration results from the mandatory construction permit provision of the Atomic Energy Act or through the efforts of a party or the presiding officer.

In resolving this matter, we believe appropriate guidance lies in the existing ex parte provision, which speaks in terms of a contested proceeding in which there is a controversy between the parties, 10 C.F.R. §§ 2.4(n), 2.780(a), over a substantive matter at issue, id. § 2.780(e). In the context of a mandatory construction permit proceeding, as to those issues in which there is no controversy among the parties, we see no reason to bar private communications to adjudicators from persons outside the agency. On the other hand, if a specific issue has

become the legitimate object of controversy in a contested operating license proceeding, whether it is introduced by the NRC staff, an intervenor, or a presiding officer sua sponte, we believe that private communications to the presiding officer from parties outside the agency should be barred. This is particularly so since, unlike mandatory construction permit proceedings, the Commission has the option in operating license proceedings of having sua sponte issues treated informally outside of the adjudicatory process through resolution by the NRC staff. Having chosen instead to resolve sua sponte issues in the context of a formal adjudicatory hearing, it makes little sense to then abandon an important component of that process, the protection against off-the-record communications from outsiders, such as the applicant or intervenors.

Ultimately, however, which interpretation to adopt is a policy choice the Commission is free to make, based upon its perceptions of the extent to which restraints upon on-the-record communications serve to enhance the confidence of the parties and the public in the overall fairness of the adjudicatory process.

2. Public Designation As an Adjudicatory Employee Only for Advisors Consulted "On a Continuing Basis"

The proposed rule allowed those staff members who previously were not involved as investigators or litigators in a proceeding to act as advisors to the Commission and, if they were to be used on a "continuing basis," required that their appointment as adjudicatory employees be publicly noticed. As we indicated in SECY-86-39, at 3-5, this was intended to create a de minimis exception that would permit a very limited number of contacts with otherwise uninvolved staff members to gain information without going through the process of designating the person as an adjudicatory employee and, thereby, formally make them subject to the ex parte

and separation of functions restrictions. As we also indicated at that time, persuasive arguments can be made both for and against such an exception. Two of the utility commenters challenged the proposed provision on the grounds it would allow the Commission without the knowledge of the parties to the proceeding to receive advice from staff personnel who, though uninvolved in the proceeding, may nonetheless be biased because of their institutional positions or otherwise.

Upon further consideration, and on the basis of our experience with staff advisors over the past year since the elimination of the Office of Policy Evaluation, we would recommend that any differentiation on the basis of whether the advisor will be used on a "continuing basis" be removed from the final rule. While this provision does give flexibility, it also could unnecessarily complicate each licensing proceeding by raising the question whether it had been invoked and to what extent. These are potential issues ripe for Freedom of Information Act requests and additional litigation. Moreover, we would expect that if individual Commissioners have questions about a particular proceeding, those NRC staff members designated to act as adjudicatory advisors for that proceeding would be able to respond, making additional communications with other, undesignated staff members unnecessary. Thus, we now would suggest eliminating this provision, which has the potential to create a controversy in every proceeding while affording little practical advantage in terms of information flow to the Commission.

### 3. Limiting Designation As an Adjudicatory Employee to Particular Issues in a Proceeding

Two commenters suggested that because the ex parte prohibition on private contacts with persons outside the agency will attach to any

staff member designated as an adjudicatory employee, the Commission should move to limit the impact of such a designation by making it applicable only to the specific issues about which the Commission wishes advice. We see little advantage in providing such designations, however, because it would enmesh the Commission in a potentially complex line drawing exercise for which there are no legal or practical guidelines. Indeed, the commenters fail to provide any legal authority for their suggestion that proceedings can be fragmented issue by issue and what authority we can find supports the opposite conclusion. The Statement of Considerations thus rejects this suggestion. Attachment 1, at 8-9.

#### 4. Retaining Restriction on Communications Between Members of the Licensing Board and Appeal Panels

The proposed rule requested comments on whether to retain the prohibition under existing agency practice, 10 C.F.R. § 2.719(c); *id.* Part 2, App. A, § IX(c), on consultations between members of the Atomic Safety and Licensing Board assigned to a proceeding and members of the Atomic Safety and Licensing Appeal Panel on any fact in issue in the proceeding. 51 Fed. Reg. 10393, 10398 (1986). The six comments received on this issue all suggested that the present practice be retained, citing the decisionmaking function of the Boards and the need to ensure fair review procedures that protect the integrity of the administrative process. It also is our understanding that neither the Appeal Board nor the Licensing Board are in favor of any rule change in this area.

Given the substantial legal uncertainty that exists in allowing lower level adjudicators who have taken a public position in a proceeding by issuing a written decision to then privately advise on the appeal of that decision, *see* 51 Fed. Reg. at 10398, and the absence of any interest in such a change by either the NRC's adjudicatory boards or those

commenting on the proposed rule, we do not recommend that the existing practice be changed.

5. Proposed Exemptions for Private Staff Consultations with the Commission Regarding Late-filed Contentions and Motions to Reopen

On the basis of an expansive reading of two decisions of the United States Court of Appeals for the District of Columbia Circuit, the proposed rule provided an exemption from the separation of functions bar on private communications from NRC staff investigators and litigators to the Commissioners and their advisors for discussions relating to the reopening of a proceeding or the filing of contentions after issuance of an initial decision. In proposing these exemptions, we noted that because the cases relied upon could be confined to their facts, whether they would support the broad interpretation we were proposing was doubtful. SECY-85-328, at 21-22. The three commenters that addressed these exemptions all vigorously questioned their validity, at least in so far as the Commission was interpreting the cases to allow private communications prior to the time a final agency decision is rendered. After carefully considering the matter, we believe that the exemptions do indeed depend upon an impermissibly broad reading of the cases and, therefore, would recommend that they not be retained.

We also agree with the suggestion of several commenters that one of these cases, RSR Corp. v. FTC, 656 F.2d 718 (D.C. Cir. 1981), strongly supports the proposition that once an agency adjudicatory proceeding has become administratively final, the separation of functions bar effectively ends for the purpose of considering any later requests to reopen or otherwise reinstitute the proceeding. We thus have added a sentence to proposed section 2.781(d) that indicates any separation of functions restriction on communications ends at the conclusion of any

Commission discretionary review of Appeal Board decisions under 10 C.F.R. § 2.786. A parallel provision also has been placed in the ex parte rule.

#### 6. Miscellaneous Revisions

In addition to these changes, we have revised the proposed rule's definition of "Commission adjudicatory employee" to reflect the abolition of OPE and the consolidation of the Office of the General Counsel and the Office of the Executive Legal Director. In the interest of administrative convenience, we also have added language to this definition that would allow the Secretary or the General Counsel as well as the Commission to designate staff members as "Commission adjudicatory employees" for a particular proceeding.

Further, taking up on the suggestion of one commenter, we are proposing the deletion of the provision in § VII of paragraph (c)(2) of Appendix A to Part 2 providing an exemption from separation of functions restrictions for "matters certified" pursuant to 10 C.F.R. §§ 2.720(h), 2.744(e). This provision, which declares that such certified matters were not considered substantive matters at issue, apparently was a product of the former practice under sections 2.720(h) and 2.744(e) by which the Commission, as a matter of discretion, had decreed that any order of a presiding officer that allowed discovery against the NRC staff automatically was certified to an Atomic Safety and Licensing Appeal Board or to the Commission. However, the legal basis for this exemption is somewhat questionable (*i.e.*, discovery disputes seemingly can go to heart of the decisional process) and, in any event, mandatory interlocutory review is no longer afforded if a presiding officer grants a discovery request for NRC staff materials. Accordingly, we see no reason to retain this exemption.




The Appeal Board, the Licensing Board, and the Division of Rules and Records reviewed a draft of the proposed final rule. Their comments are incorporated in this proposed final rule.

Recommendation:

1. Authorize the Secretary to issue the final rule amending 10 C.F.R Parts 0 and 2.
2. Note that:
  - a. The final rule will become effective thirty days after publication in the Federal Register.
  - b. The final rule contains the requisite Regulatory Flexibility Act certification.
  - c. This final rule contains no information collection requirements and therefore is not subject to the Paperwork Reduction Act.
  - d. The final rule comes within the categorical exclusion in 10 C.F.R. § 51.22(c)(1) and no environmental assessment has been prepared.
  - e. A regulatory analysis regarding the final rule is included in the Statement of Considerations.
  - f. The final rule does not require a backfit analysis pursuant to 10 C.F.R. § 50.109(c).
  - g. The Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works, the Subcommittee on Energy and the Environment of the House Interior and Insular Affairs Committee, and the Subcommittee on Energy and Power of the House Energy and Commerce Committee will be informed of the final rule by letter from the Office of Congressional Affairs.

- h. A public announcement will be issued when the final rule is filed with the Office of the Federal Register.

  
William C. Parler 2/10/88  
General Counsel

Attachment:  
As stated

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Monday, February 29, 1988.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Monday, February 22, 1988, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of February 29, 1988. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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Attachment 1

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 0 and 2

Revision to Ex Parte and Separation of Functions Rules  
Applicable to Formal Adjudicatory Proceedings

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: This final rule amends the Commission's rules of practice by revising those regulations dealing with ex parte communications and separation of functions in formal adjudicatory proceedings. This amendment updates the existing rules by incorporating requirements imposed by the Government in the Sunshine Act as it relates to ex parte communications. The final rule also allows members of the NRC staff to serve as confidential advisors to the Commission with respect to a contested proceeding so long as those staff members do not act as investigators or litigators in the proceeding. This rule is intended to aid in maintaining effective communication between decisionmaking officials and NRC staff personnel and individuals outside the NRC while ensuring that proceedings are conducted in an impartial manner.

EFFECTIVE DATE: (Insert date 30 days after date of publication in the Federal Register.)

FOR FURTHER INFORMATION CONTACT: Paul Bollwerk, Senior Attorney, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC. 20555, Telephone: (202) 634-3224.

SUPPLEMENTARY INFORMATION:

I. Background.

On March 26, 1986, the Nuclear Regulatory Commission published in the Federal Register (51 FR 10393-10402) proposed amendments to its Rules of Practice (10 CFR Part 2) that would revise substantially its regulatory restrictions on private communications between agency adjudicatory decisionmakers and members of the NRC staff or persons outside the agency with regard to matters that are the subject of a formal adjudicatory hearing. By notice published in the Federal Register on May 27, 1986 (51 FR 19067), the date for submitting comments on the proposed revisions was extended to June 26, 1986.

The Commission's March 1986 rulemaking proposal was the culmination of an extended agency effort to address concerns about its existing rules governing private communications with agency adjudicatory decisionmakers.

On March 7, 1979 (44 FR 12428), in response to the adoption of the Government in the Sunshine Act with its provisions placing specific restrictions on ex parte communications between adjudicatory decisionmakers and persons outside the agency (5 U.S.C. 551(14), 556(d), 557(d)), the Commission published a proposed rule to revise its existing regulations to incorporate the new statutory provisions. Thereafter, as a result of the

accident in March 1979 at Three Mile Island, Unit 2, the Commission's operating procedures came under intense scrutiny. Recommendations were received from several quarters, including Three Mile Island inquiry groups, the American Bar Association, and the Commission's Office of the General Counsel and its Regulatory Reform Task Force, that suggested the Commission's existing rules on separation of adjudicatory and nonadjudicatory functions, which barred private contacts between any member of the NRC staff and the Commission regarding contested issues in an adjudicatory proceeding, were overly stringent as compared to the specific requirements of the Administrative Procedure Act (APA) (5 U.S.C. 554(d)). According to several of these reports, this too strict interpretation was impeding the agency's ability to protect the public health and safety by isolating the Commission unnecessarily from NRC staff knowledge and expertise.

Recognizing these concerns, a proposed rule was published in March 1986 that superseded and withdrew the 1979 proposed rule. This new proposal contained a number of suggested organizational and substantive changes in the existing regulations, 10 CFR 2.719 and 2.780, regarding communications precluded by ex parte and separation of functions considerations. In addition to consolidating these provisions into consecutive sections, §§ 2.780 and 2.781, common definitions were proposed for inclusion in § 2.4 in an effort to make both the ex parte and separation of functions strictures more understandable. Section 2.780 was to become the vehicle for implementation of the Sunshine Act's restrictions on ex parte communications, while private contacts between the NRC staff and Commission adjudicatory decisionmakers were to be restricted under § 2.781 to comply with the APA's separation of functions prohibition.

## II. Comments and Commission Responses.

The Commission received eleven letters of comment that set forth the views of interested utilities, professional organizations, private counsel, and individual members of the public. Ten of the eleven commenters expressed general support for the Commission's effort to revise its ex parte and separation of functions strictures and provided specific comments on particular provisions of the rule. One commenter expressed total dissatisfaction with the proposed rule as an improper attempt to give the NRC staff an opportunity to advise the Commission's hearing boards privately about Commission policy and "what the Commissioners want . . . ." A review of the specific comments and the Commission's responses to those comments follows.

### A. Definition of "Relevant to the Merits"

Five commenters provided their views on the Commission's discussion of the phrase "relevant to the merits of the proceeding" as it is used in the Sunshine Act, 5 U.S.C. 557(d), and the proposed rule, § 2.780(a), to define those matters raised in the context of a hearing that are subject to the ex parte restriction. In the proposed rule, the Commission requested comments on whether this phrase should be interpreted to include any issue that must be considered in an uncontested construction permit proceeding even though it is not the object of a dispute among the NRC staff, the applicant, and any intervenors, and any issue that was not raised by any party but nonetheless is considered in an operating license hearing sua sponte by the presiding officer. Three of the commenters thought that the phrase should be

interpreted to bar only those private communications relating to issues put into controversy by the parties to the proceeding. Two other commenters expressed the view that private communications should be barred with respect to any issue that a party or the presiding officer proposed to have considered in a particular proceeding, whether consideration is due to the Atomic Energy Act mandate to conduct a hearing on a construction permit or consideration is proposed by a party or the presiding officer.

Under existing practice, ex parte restrictions apply to any substantive matter at issue in a contested proceeding (10 CFR 2.780(a), (e)). A contested proceeding, in turn, is defined as one in which there is a controversy between the staff and the applicant concerning the issuance of or any of the terms and conditions of a license or is one in which a petition for leave to intervene to oppose the application is granted or is pending (10 CFR 2.4(n)). Under this definition, the elements of "controversy" and "matters at issue" are central. We believe this approach also should be applied in interpreting the section 557(d) phrase "relevant to the merits." Accordingly, in the context of a statutorily mandated construction permit proceeding in which no intervenor has sought to contest the application, private communications to adjudicatory employees from interested persons outside the agency relating to matters that are not the subject of controversy in the proceeding between the applicant and the NRC staff would not be considered ex parte. On the other hand, because the Commission has chosen as a matter of policy to allow issues in operating license proceedings to be admitted sua sponte by a presiding officer, as opposed to being resolved informally by the NRC staff, it makes little sense to abandon an important component of that process--the protection against off-the-record communications. Once a matter is "at issue" in an



operating license proceeding, whether at the behest of the presiding officer or because it was admitted as a party's contention, a requirement that public disclosure of all communications to the presiding officer relative to the resolution of that contested issue serves to ensure that the proceedings are fairly and impartially conducted. Therefore, private communications to the presiding officer from persons outside the agency concerning sua sponte issues will be considered ex parte.

It should be added that the term "disputed issue" as it is used in the separation of functions provision relating to NRC staff contacts with a presiding officer also would be interpreted in a mandatory construction permit proceeding without intervening interested persons, to include only those matters that are the object of dispute between the applicant and the NRC staff and, in any operating licensing proceeding, those "sua sponte" issues properly raised by a presiding officer.

#### B. Distinction between Accusatory and Nonaccusatory Proceedings

In the proposed rule, the Commission indicated that, for purposes of applying the separation of functions bar, it would interpret APA section 554(d) as making separation of functions applicable both to accusatory proceedings, i.e., those in which the primary concern is the lawfulness of party conduct, and to nonaccusatory proceedings, such as initial licensing, in which the decision typically is reached on the basis of legislative facts and general policy considerations. (51 FR at 10395) As a result, separation of functions is applicable to anyone performing a "litigating" function in a particular proceeding, rather than being limited only to those acting as

"prosecutors," as the language of section 554(d) might be read to suggest. Three commenters asserted that the Commission should not adopt such a narrow reading but rather should limit separation of functions only to accusatory proceedings. This effectively would permit private consultations between NRC staff members involved in litigating a case and adjudicatory officials regarding contested issues in at least some initial licensing cases, including reactor construction permit and operating license proceedings.

As the Commission indicated previously in the proposed rule (51 FR at 10395), to attempt to differentiate between accusatory and nonaccusatory proceedings would require the Commission to apply subtle and difficult distinctions in an effort to determine to what extent the focus of a particular proceeding will be "prosecutorial." We continue to believe that such an attempt is not a worthwhile use of Commission resources, particularly because considerable uncertainty exists about whether the application of the accusatory/nonaccusatory distinction is appropriate under section 554(d) (51 FR at 10397). Further developments in the case law governing this distinction may cause the Commission to revisit this issue in the future. At present, however, the Commission will impose separation of functions restrictions on private communications between agency adjudicatory officials and the NRC staff in all formal adjudicatory proceedings conducted under 10 CFR Part 2, Subpart G, without regard to whether the proceeding otherwise might appear to be accusatory or nonaccusatory.

C. Public Designation As an Adjudicatory Employee Only for Staff  
Advisors Consulted "On a Continuing Basis"

Although the Commission will not apply the separation of functions restriction on the basis of the accusatory/nonaccusatory distinction, it will limit that restriction as it applies to private communications with the Commission solely to those staff members who have performed "investigating or litigating" functions in a particular proceeding. Thus, a member of the NRC staff who was not involved in conducting or supervising the technical review of an application that is the subject of an adjudicatory proceeding or the litigation of the matter before an Atomic Safety and Licensing Board or an Atomic Safety and Licensing Appeal Board can serve as a confidential advisor to the Commission with respect to the application and the merits of the adjudication. Section 2.4(9) of the proposed rule stated that if a staff member was to be consulted by the Commission with respect to the issues in a particular proceeding "on a continuing basis," that person would be appointed as an adjudicatory employee and the parties to the proceeding would be given notice of that appointment. Two commenters asserted that public designation only for staff advisors consulted "on a continuing basis" was unfair and created a great potential for abuse. Upon further consideration, the Commission has decided that the purposes of the rule would be better served if each member of the staff who will be used as an advisor in an adjudication is appointed publicly as an adjudicatory employee without regard to the duration of anticipated service.

D. Limiting Designation As an Adjudicatory Employee to Particular Issues in a Proceeding

Two commenters also suggested that because the ex parte prohibition on private contacts with persons outside the agency will attach to any staff member designated as an adjudicatory employee, the Commission should act to limit the impact of the designation by making it applicable only to the specific issues about which the Commission wishes advice from the employee. After reviewing this comment carefully, the Commission has decided not to adopt such a provision.

This proposal for issue by issue adjudicatory advisors arguably would avoid the ex parte ban on outside contacts regarding the nondesignated issues. It also appears that, carried to its logical conclusion, this proposal would sanction staff members simultaneously assuming the dual role of adjudicator and investigator/litigator in the same proceeding, at least so long as different issues were involved. Neither the language of section 554(d), which states that a person performing an investigative or litigating function is not to advise in a "case or a factually related case," nor the Attorney General's Manual on the APA, which speaks of the bar in terms of "cases" or "proceedings" rather than "issues," see United States Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 54-55 & n.6 (1947), suggests that such an issue by issue application of the separation of functions bar is appropriate. Similarly, judicial precedent suggests that the separation of functions bar should be applied to prohibit participation in all aspects of a proceeding by a staff member performing an investigative or litigative function in that proceeding, not just with respect to those issues

with which the individual has particular involvement. See Trans World Airlines, Inc. v. CAB, 254 F.2d 90, 91 & n.2 (D.C. Cir. 1958). This authority, in combination with the practical complications involved in drawing lines to separate investigating or litigating participation in part of a proceeding from decisionmaking participation in other parts, convinces the Commission that it should not adopt this suggestion.

E. Allowing Former Adjudicatory Advisors to Perform Litigative or Investigative Functions In the Same Proceeding

Related to the question of issue by issue designation of adjudicatory employees is the issue whether an employee who has put aside the mantle of adjudicatory employee can thereafter become a staff litigator or investigator in the same proceeding. The proposed rule did not contain any provision that addressed this question. However, in response to a Commission request for comments on the propriety of including language that would permit a switch in roles, three commenters supported the addition of a provision. Two commenters, however, opposed the suggestion citing the unfair advantage a former advisor would give the staff in accusatory proceedings because of the insights he or she had gained in the decision making process and the detrimental effect allowing such a switch in roles would have in public confidence in the fairness of the proceeding.

The Commission is not convinced that the change from the role of an adjudicatory decisionmaker's advisor to a litigator or investigator necessarily is one the APA or constitutional due process would preclude. Nonetheless, we do agree with the observation of one of the commenters opposed

to allowing this type of role change that present staffing levels make it unlikely that NRC staff members who previously have provided advice to agency adjudicatory decisionmakers will need to be pressed into service as litigators or investigators in the same proceeding. Accordingly, the Commission believes that the best course is to leave this issue for determination if and when it arises in a particular case.

F. Restriction on Communications Between Members of the Licensing Board and the Appeal Panel

The proposed rule would not change existing agency practice, embodied in § 2.719(c) and Part 2, App. A, IX(c), that precludes consultations between members of the Atomic Safety and Licensing Board assigned to a proceeding and members of the Atomic Safety and Licensing Appeal Panel on any fact in issue in the proceeding. The Commission, however, requested comments on whether this bar to communications was necessary or appropriate (51 FR at 10398). Six of the commenters addressed this issue and all supported retaining the present practice, citing the decisionmaking function of the Boards and the need to ensure fair review procedures that protect the integrity of the administrative record. The Commission will do so.

G. Exemptions for Private Staff Consultations with the Commission  
Regarding Late-filed Contentions and Motions to Reopen

In setting out a number of possible exemptions to the separation of functions provision of the proposed rule, the Commission proposed that private consultations between the NRC staff and Commission be permitted in instances when a request was made to add issues to a proceeding after an initial decision is rendered or to reopen the record after an initial or final decision. Proposed § 2.781(b)(2)(v)-(vi). In support of each of these exemptions, the Commission referenced judicial decisions allowing agency staff contacts with agency heads about the addition of issues to a proceeding or about reopening the record (51 FR at 10399). The three commenters that addressed these exemptions all questioned their validity, asserting that the Commission was going beyond what was sanctioned by the cases, at least prior to the time a final agency decision is rendered. Upon further consideration, the Commission has decided to delete these proposed exemptions as they relate to attempts to add issues or reopen the record prior to a final agency decision.

Nonetheless, the United States Court of Appeals for the District of Columbia Circuit's decision in RSR Corp. v. FTC, 656 F.2d 718 (D.C. Cir. 1981) (per curiam), fairly can be read as holding that once an agency adjudicatory proceeding, or a discrete portion of that proceeding, has become administratively final, which would include the conclusion of any Commission discretionary review of Appeal Board decisions under 10 CFR 2.786, the separation of functions bar effectively ends for the purpose of considering any later requests to reopen or otherwise reinstitute the proceeding. Two

commenters suggested the Commission include a provision in its proposed rule indicating when the separation of functions prohibition would end. In response to that comment, and in line with RSR Corp., we have decided to add a sentence to § 2.781(d) that accomplishes this purpose. Moreover, a parallel provision has been added to § 2.780 to indicate that the ex parte prohibition will be terminated at the same point.

#### H. Additional Comments by Particular Parties

In addition to the matters discussed above that were the subject of multiple comments, other commenters raised the specific issues addressed below.

1. Scientists and Engineers for Secure Energy, Inc.

The Scientists and Engineers for Secure Energy, Inc., ("SESE") questioned in general the agency's use of "accusatory" adversarial, trial-type procedures for nuclear power plant licensing. According to SESE, the trial-type hearing required by 10 CFR Part 2, Subpart G is unnecessarily legalistic and stands in the way of getting to the appropriate factual and analytical bases for making informed judgments about those technical disputes that form a great portion of the controversy in power plant licensing proceedings. This comment relates to matters that are beyond the bounds of this rulemaking proceeding; however, the Commission would note that in the context of its consideration of the certification process for standardized designs for nuclear power plants, it has been considering ways to simplify the procedural aspects of any hearings



held as part of that process. In addition, it recently has taken steps in the area of materials licensing hearing procedures that are intended to address some of the criticisms of the formal adjudicatory process raised by SESE (52 FR 20089; May 29, 1987 (proposed rule on informal hearing procedures for materials licensing adjudications)).

## 2. Pars Associates, Inc.

Pars Associates, Inc ("PAI") suggested that the proposed definition of "interested persons" subject to ex parte restrictions somehow acts to restrict unduly the participation of large numbers of the public in the adjudicatory process. In fact, that definition does not limit participation at all, but merely identifies those persons outside the agency whose communications to an adjudicatory decisionmaker must be made on the record to avoid being considered as improper ex parte communications.

## 3. Marvin Lewis

Commenter Marvin Lewis stated that he opposed the proposed rule because it would provide an opportunity for the Commission and the NRC staff to discuss policy matters and those discussions could be used by the staff to "continuously" update the hearing boards on the Commission's position with respect to particular hearings. This clearly is incorrect. As the discussion accompanying the proposed rule made apparent (51 FR at 10399), under § 2.781(e) staff members who become adjudicatory advisors cannot be the conduit for otherwise improper communications from the Commission to those

staff members serving as litigators or investigators in a hearing proceeding. That provision is retained in the final rule.

#### 4. Shaw, Pittman, Potts & Trowbridge

The law firm of Shaw, Pittman, Potts & Trowbridge, on behalf of its utility clients, noted that paragraph (6) of the proposed definition of "Commission adjudicatory employee" in § 2.4 should be revised to reflect the consolidation and reorganization of the Office of the General Counsel and the Office of the Executive Legal Director and suggested that the phrase "in a proceeding" be added to paragraph (8) to make it clear that the appointment of a staff member to serve as an adjudicatory employee applies only to the particular proceeding for which the appointment is made. This has been done. Further, in response to another of the firm's comments regarding the scope of the phrase "interested person" as it is used to define those outside the agency who are subject to the restriction on ex parte communications, the Commission notes that the phrase is intended to include coverage of the representative of an interested State, county, municipality, or an agency thereof, participating in a proceeding in accordance with 10 CFR 2.715(c).

#### 5. Bishop, Liberman, Cook, Purcell & Reynolds

On behalf of several utility clients, the law firm of Bishop, Liberman, Cook, Purcell & Reynolds suggested that proposed §§ 2.780(f)(4) and 2.781(b)(iv), which provide an exception from the ex parte and separation of

functions restrictions for communications on generic issues, be revised to delete language indicating that the communication must not be "associated by" the Commission adjudicatory employee, the NRC officer or employee performing investigative or litigating functions, or the person outside the agency "with the resolution of any proceeding under [10 CFR Subpart G] pending before the NRC." According to the commenter, this language improperly places the focus on how the NRC adjudicatory officials reviewing the communication or the NRC staff member or interested person making the communication view the generic issue in relation to an ongoing Subpart G formal adjudicatory proceeding.

As was explained in the proposed rule (51 FR at 10397), this language was added to make it clear that off the record communications regarding generic matters are not to be presented or used as a basis for resolving issues in a formal, "on the record" proceeding. Thus, a communicator's attempt to associate a communication purportedly relating to a generic matter with the resolution of matters in a proceeding or an adjudicator's association of an otherwise proper communication on generic matters with the resolution of issues in a formal proceeding would make those communications subject to the ex parte or separation of functions restrictions and require that the agency take appropriate measures, such as public disclosure of the communication, in accordance with § 2.780(c) or § 2.781(c). It was the Commission's intention, however, that a determination about whether a "generic" matter was in fact associated with the resolution of contested issues in a proceeding should not be governed solely by the perceptions of those making or using the communication. Accordingly, the suggested deletion will be made with the intent that it is only to dispell any ambiguity about the standard for

determining whether a "generic" communication was, in fact, one actually associated with a licensing proceeding.

7. LeBoeuf, Lamb, Leiby & MacRae

On behalf of a number of its utility clients, the law firm of LeBoeuf, Lamb, Leiby & MacRae questioned whether, given the designation of duties in 10 CFR 1.33 that suggests they are not involved in the decisional process, the Secretary of the Commission and employees of the Office of the Secretary should be designated as "Commission adjudicatory employees." The involvement of employees of the Office of the Secretary in the decision making process is in major part administrative. The Secretary nevertheless does have the authority to issue certain procedural orders that can have an important impact on a proceeding, see 10 CFR 2.772. Employees of that office also have access to otherwise confidential information concerning Commission decisions and oft times aid the Commission's decisional process by facilitating the exchange of views between Commissioner offices. Employees of the Office of the Secretary therefore will continue to be designated as adjudicatory employees.

This commenter also suggested that the Commission delete § 2.780(d) that provides for sanctions against outside parties who knowingly make ex parte communications. The commenter opines that this provision is unnecessary because the appropriate remedy for these communications is to make them public and notify the parties. It has been the Commission's experience that this is the appropriate remedy for an ex parte communication. Nonetheless, it is not inconceivable, as the Congress recognized in adopting APA section 557(d)(1)(D), the statutory basis for § 2.780(d), that some violations may

warrant the types of sanctions against the offending party that § 2.780(d) authorizes. The Commission therefore declines to delete this provision.

This commenter also declared that proposed § 2.781(b)(3), which states that "[n]one of the communications permitted by paragraph (b)(2) of this section is to be associated . . . with the resolution of any proceeding . . . ," is unclear and suggested the substitution of the word "used" for "associated." The term "associated," which also is utilized in § 2.780(f)(4), is intended to have a somewhat broader meaning than "used" to the extent that it covers not only the use of the prohibited communication, but also the act of making the communication, even if it is not used by the adjudicatory employee. The Commission likewise declines to change this provision.

Finally, this commenter suggested that in section VII of paragraph (c)(2) of Appendix A to Part 2 the reference to "matters certified" pursuant to §§ 2.720(h) and 2.744(e) should be deleted because neither referenced section calls for certification of anything. Previously, these sections did provide for automatic certification to an Atomic Safety and Licensing Appeal Board or to the Commission of a presiding officer's order allowing discovery against the NRC staff under a subpoena or request for the production of documents (37 FR 15127, 15132, 15135; July 28, 1972). Under the terms of Appendix A, however, such a discovery dispute was not considered a substantive matter at issue in the proceeding requiring that there be no intraagency consultations and communications regarding the dispute (37 FR at 15124). Upon further consideration, we see no reason to retain this discovery distinction given the later revision of the Commission's discovery rules to provide the presiding officer with the discretion to order discovery against the NRC staff without

mandatory Commission interlocutory review (40 FR 2973; Jan. 17, 1975).

Accordingly, this discovery certification provision now is being deleted from Appendix A, section VII(c)(2).

#### 8. Baltimore Gas And Electric Company

Commenter Baltimore Gas and Electric Company questioned the propriety of proposed § 2.781(f), which requires that the substance of a communication between an adjudicatory decisionmaker and an advisor that is properly made under the separation of functions bar nonetheless may be required to be disclosed if the adjudicatory decisionmaker's initial or final decision is stated to rest in whole or in part on information made known in the communication. The commenter suggests that this is insufficient because the communication is made public only if it is relied upon. However, this comment fails to recognize that the scope of this provision goes only to communications that otherwise are made in conformance with the separation of functions restriction. Under § 2.781(c) all private communications from a litigator or investigator to an adjudicatory decisionmaker barred by separation of functions considerations must be publicly disclosed. The § 2.781(f) provision is a different, broader protection. It is designed to ensure that an adjudicatory decision is based upon the record developed during the hearing, not upon the otherwise proper but nonetheless private revelations of an adjudicatory advisor that provide a new factual or analytical basis for the decision. The Commission sees no basis for deleting this provision.

## 9. GPU Nuclear Corporation

GPU Nuclear Corporation suggested that the Commission include a definition of the conditions under which a licensee may participate in ex parte communications with the NRC staff on issues relating to an adjudicatory proceeding. Because it is clear from §§ 2.780 and 2.781 that the only ex parte/separation of functions restraint upon communications between an applicant or licensee and members of the NRC staff is for those staff members who are appointed as adjudicatory advisors, no further definition is needed to reiterate this point. Also unnecessary, the Commission finds, is this commenter's suggestion that a specific provision be included to allow the Commission to decide and announce the termination of the appointment of a staff member as an adjudicatory advisor. This power is inherent in the Commission's administrative authority to direct the activities of members of the NRC staff and need not be spelled out further.

### Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed regulation.

### Paperwork Reduction Review

This final rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, et seq.).

### Regulatory Analysis

Under the APA, 5 U.S.C. 554(d), 557(d), in formal adjudicatory proceedings, restrictions apply to communications between adjudicators and agency employees performing investigative or litigating functions or interested persons outside the agency. The revisions in this final rule's provisions on ex parte communications will conform the language of the agency's present regulations more closely to the Sunshine Act's provisions restricting communications with persons outside the agency. This amendment does not affect the substantive restrictions on outside communications applicable under present regulations. Under the revised separation of functions rule, however, there will be an increased possibility for adjudicator/staff communications because those staff members not involved in an investigative or litigating function in a particular proceeding can advise decisionmakers on matters at issue in that proceeding. The potential for increased information to adjudicators makes this rule change preferable to existing requirements. While other possible rule change options exist, notably invocation of the "initial licensing" exemption in the APA or reading the section 554(d) restriction to apply only to "prosecutors" rather than "litigators," serious questions about the efficacy of these particular



revisions make them unacceptable both in terms of agency resources to defend the rules and the possibility of judicial reversal of licensing actions based on the application of the rules. The final rule thus is the preferred alternative and the cost involved in its promulgation and application is necessary and appropriate. The foregoing discussion constitutes the regulatory analysis for this final rule.

#### Regulatory Flexibility Certification

This final rule will not have a significant economic impact upon a substantial number of small entities. Most entities seeking or holding construction permits or Commission licenses that would be subject to the revised ex parte provisions would not fall within the definition of small businesses found in section 34 of the Small Business Act, 15 U.S.C. 632, in the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121, or in the NRC's size standards published December 9, 1985 (50 FR 50241). Although intervenors subject to the provision on ex parte communications likely would fall within the pertinent Small Business Act definition, the ex parte rule would not reduce or increase the litigation burden of intervenors because it is substantially the same as the restrictions now in effect. Although the revised restrictions on intraagency communications found in the separation of functions provision might result in some cost reduction in proceedings in that the increased availability to adjudicators of staff expertise may shorten the proceedings, that reduction probably will be negligible. Thus, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), the NRC hereby certifies that

this rule does not have a significant economic impact upon a substantial number of small entities.

#### Backfit Analysis

This final rule does not modify or add to systems, structures, components, or design of a facility; the design approval or manufacturing license for a facility; or the procedures or organization required to design, construct, or operate a facility. Accordingly, no backfit analysis pursuant to 10 CFR 50.109(c) is required for this proposed rule.

## List of Subjects in 10 CFR Parts 0 and 2

Part 0 - Conflict of interest, Penalty.

Part 2 - Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Parts 0 and 2:

## PART 0 -- CONDUCT OF EMPLOYEES

1. The authority citation for Part 0 is revised to read as follows:

Authority: Secs. 25, 161, 68 Stat. 925, 948, as amended (42 U.S.C. 2035, 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); E.O. 11222, 30 FR 6469, 3 CFR 1964-1965 COMP., p. 306; 5 CFR 735.104.

Sections 0.735-21 and 0.735-29 also issued under 5 U.S.C. 552, 553. Section 0.735-26 also issued under secs. 501, 502, Pub. L. 95-521, 92 Stat. 1864, 1867, as amended by secs. 1, 2, Pub. L. 96-28, 93 Stat. 76, 77 (18 U.S.C. 207).

2. Section 0.735-48 is revised to read as follows:

§ 0.735-48 Restricted Communications.

Certain employee communications are prohibited in formal adjudicatory proceedings under §§ 2.780 and 2.781 of this chapter.

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

3. The authority citation for Part 2 is revised to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub.L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub.L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub.L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub.L. 91-190, 83 Stat. 853 as amended (42 U.S.C. 4332). Sections 2.700a, 2.781 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub.L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub.L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Appendix A also issued under sec. 6, Pub.L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub.L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.)

4. Section 2.4 is amended by removing the alphabetical paragraph designators, alphabetizing all words defined, and adding three new definitions to read as follows:

§ 2.4 Definitions.

\* \* \* \* \*

"Commission adjudicatory employee" means --

- (1) The Commissioners and members of their personal staffs;
- (2) The members of the Atomic Safety and Licensing Appeal Panel and staff assistants to the Panel;
- (3) The members of the Atomic Safety and Licensing Board Panel and staff assistants to the Panel;
- (4) A presiding officer appointed under § 2.704, including an administrative law judge, and staff assistants to a presiding officer;
- (5) Special assistants (as defined in § 2.772);
- (6) The General Counsel, the Solicitor, the Deputy General Counsel for Licensing and Regulation, and employees of

the Office of the General Counsel under the supervision of the Solicitor or the Deputy General Counsel for Licensing and Regulation;

- (7) The Secretary and employees of the Office of the Secretary; and
  
- (8) Any other Commission officer or employee who is appointed by the Commission, the Secretary, or the General Counsel to participate or advise in the Commission's consideration of an initial or final decision in a proceeding. Any other Commission officer or employee who, as permitted by § 2.781, participates or advises in the Commission's consideration of an initial or final decision in a proceeding must be appointed as a Commission adjudicatory employee under this paragraph and the parties to the proceeding must be given written notice of the appointment.

\* \* \* \* \*

"Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

\* \* \* \* \*

"Investigative or litigating function" means --

- (1) Personal participation in planning, conducting, or supervising an investigation; or
- (2) Personal participation in planning, developing, or presenting, or in supervising the planning, development or presentation of testimony, argument, or strategy in a proceeding.

§ 2.719 [removed]

5. Section 2.719 is removed.

6. Part 2 is amended by revising the undesignated centerhead immediately after § 2.772 to read as follows:

#### RESTRICTED COMMUNICATIONS

7. Section 2.780 is revised to read as follows:

§ 2.780 Ex parte communications.

In any proceeding under this subpart --

- (a) Interested persons outside the agency may not make or knowingly cause to be made to any Commission adjudicatory employee, any ex parte communication relevant to the merits of the proceeding.
- (b) Commission adjudicatory employees may not request or entertain from any interested person outside the agency or make or knowingly cause to be made to any interested person outside the agency, any ex parte communication relevant to the merits of the proceeding.
- (c) Any Commission adjudicatory employee who receives, makes, or knowingly causes to be made a communication prohibited by this section shall ensure that it and any responses to the communication promptly are served on the parties and placed in the public record of the proceeding. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.
- (d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Commission or other adjudicatory employee presiding in a proceeding may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why its claim or interest in the



ing should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

(e) (1) The prohibitions of this section apply--

(i) When a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703; or

(ii) Whenever the interested person or Commission adjudicatory employee responsible for the communication has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703.

(2) The prohibitions of this section cease to apply to ex parte communications relevant to the merits of a full or partial initial decision when, in accordance with § 2.786, the time has expired for Commission review of the Atomic Safety and Licensing Appeal Board's decision on the full or partial initial decision.

(f) The prohibitions in this section do not apply to --

(1) Requests for and the provision of status reports;

- (2) Communications specifically permitted by statute or regulation;
- (3) Communications made to or by Commission adjudicatory employees in the Office of the General Counsel regarding matters pending before a court or another agency; and
- (4) Communications regarding generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated with the resolution of any proceeding under this subpart pending before the NRC.

8. New § 2.781 is added to read as follows:

§ 2.781 Separation of functions.

- (a) In any proceeding under this subpart, any NRC officer or employee engaged in the performance of any investigative or litigating function in that proceeding or in a factually related proceeding may not participate in or advise a Commission adjudicatory employee about the initial or final decision on any disputed issue in that proceeding, except --
  - (1) As witness or counsel in the proceeding;

- (2) Through a written communication served on all parties and made on the record of the proceeding; or
  - (3) Through an oral communication made both with reasonable prior notice to all parties and with reasonable opportunity for all parties to respond.
- (b) The prohibition in paragraph (a) of this section does not apply to --
- (1) Communications to or from any Commission adjudicatory employee regarding --
    - (i) The status of a proceeding;
    - (ii) Matters with regard to which the communications specifically are permitted by statute or regulation;
    - (iii) Agency participation in matters pending before a court or another agency; or
    - (iv) Generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, or occasional hearings on legislation, budgetary planning) not associated with

the resolution of any proceeding under this subpart pending before the NRC.

- (2) Communications to or from Commissioners, members of their personal staffs, Commission adjudicatory employees in the Office of the General Counsel, and the Secretary and employees of the Office of the Secretary, regarding --
  - (i) Initiation or direction of an investigation or initiation of an enforcement proceeding;
  - (ii) Supervision of agency staff to ensure compliance with the general policies and procedures of the agency;
  - (iii) Staff priorities and schedules or the allocation of agency resources; or
  - (iv) General regulatory, scientific, or engineering principles that are useful for an understanding of the issues in a proceeding and are not contested in the proceeding.
- (3) None of the communications permitted by paragraph (b)(2)(i)-(iii) of this section is to be associated by the Commission adjudicatory employee or the NRC officer

or employee performing investigative or litigating functions with the resolution of any proceeding under this subpart pending before the NRC.

(c) Any Commission adjudicatory employee who receives a communication prohibited under paragraph (a) of this section shall ensure that it and any responses to the communication are placed in the public record of the proceeding and served on the parties. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.

(d) (1) The prohibitions in this section apply--

(i) When a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703; or

(ii) Whenever an NRC officer or employee who is or has reasonable cause to believe he or she will be engaged in the performance of an investigative or litigating function or a Commission adjudicatory employee has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703.

- (2) The prohibitions of this section will cease to apply to the disputed issues pertinent to a full or partial initial decision when, in accordance with § 2.786, the time has expired for Commission review of the Appeal Board's decision on the full or partial initial decision.
- (e) Communications to, from, and between Commission adjudicatory employees not prohibited by this section may not serve as a conduit for a communication that otherwise would be prohibited by this section or for an ex parte communication that otherwise would be prohibited by § 2.780.
- (f) If an initial or final decision is stated to rest in whole or in part on fact or opinion obtained as a result of a communication authorized by this section, the substance of the communication must be specified in the record of the proceeding and every party must be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert the fact or opinion prior to the filing of the decision, a party may controvert the fact or opinion by filing an appeal from an initial decision, or a petition for reconsideration of a final decision that clearly and concisely sets forth the information or argument relied on to show the contrary. If appropriate, a party may be afforded the opportunity for cross-examination or to present rebuttal evidence.

9. Appendix A to Part 2 is amended by revising paragraph (c) of section VII and paragraph (c) of section IX to read as follows:

Appendix A - Statement of General Policy and Procedure: Conduct of Proceedings for the Issuance of Construction Permits and Operating Licenses for Production and Utilization Facilities for Which a Hearing Is Required Under Section 189A of the Atomic Energy Act of 1954, As Amended\*

\* \* \* \* \*

#### VII. General

\* \* \* \* \*

(c) Section 2.781 specifies when consultation between Commissioners or boards, on the one hand, and the staff, on the other hand, is permitted in licensing proceedings conducted under Subpart G. Section 2.781 also permits a board, in the same type of proceeding, to consult with members of the panel from which the members of the board are drawn.

\* \* \* \* \*

IX. Licensing Proceedings Subject to Appellate Jurisdiction of  
Atomic Safety and Licensing Appeal Board.

\* \* \* \* \*

- (c) Consultation between members of the Atomic Safety and Licensing Appeal Board for a particular proceeding and the staff is permitted on the conditions specified in 10 CFR 2.781. However, members of the atomic safety and licensing boards for particular proceedings may not consult on any disputed issue in those proceedings with members of the Appeal Panel.

\* \* \* \* \*

Dated at Washington, D.C., this \_\_\_\_ day of \_\_\_\_\_, 1988.

For the Nuclear Regulatory Commission.

\_\_\_\_\_  
SAMUEL J. CHILK,  
Secretary of the Commission.



Attachment 2

LIST-OF-SUBJECTS-IN-10-CFR-PART-0

List of Subjects in 10 CFR Parts 0 and 2

Part 0 - Conflict of interest, Penalty.

LIST-OF-SUBJECTS-IN-10-CFR-PART-2

Part 2 - Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Parts 0 and 2:

PART 0 -- CONDUCT OF EMPLOYEES

1. The authority citation for Part 0 is revised to read as follows:

Authority: Secs. 25, 161, 68 Stat. 925, 948, as amended (42 U.S.C. 2035, 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); E.O. 11222, 30 FR 6469, 3 CFR 1964-1965 COMP., p. 306; 5 CFR 735.104.

Sections 0.735-21 and 0.735-29 also issued under 5 U.S.C. 552, 553. Section 0.735-26 also issued under secs. 501, 502, Pub. L. 95-521, 92 Stat. 1864, 1867, as amended by secs. 1, 2, Pub. L. 96-28, 93 Stat. 76, 77 (18 U.S.C. 207).

2. Section 0.735-48 is revised to read as follows:

§ 0.735-48 Restricted Communications.

Certain employee communications are prohibited in formal adjudicatory proceedings under §§ 2.780 and 2.781 of this chapter.

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

3. The authority citation for Part 2 is revised to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub.L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub.L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub.L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). ~~Sections 2.300-2.309 also issued under Pub.L. 97-415, 96 Stat. 2071 (42 U.S.C. 2133).~~ Sections 2.600-2.606 also issued under sec. 102, Pub.L. 91-190, 83 Stat. 853 as amended (42 U.S.C. 4332). Sections 2.700a, 2.781 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub.L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under Sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub.L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Appendix A also issued under sec. 6, Pub.L. 91-586, 84 Stat. 1473 (42 U.S.C.

2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b, et seq.).

4. Section 2.4 is ~~revised~~ amended by removing the alphabetical paragraph designators, alphabetizing all words defined, and adding three new definitions to read as follows:

§ 2.4 Definitions.

\* \* \* \* \*

"Commission adjudicatory employee" means --

- (1) ~~t~~The Commissioners and members of their personal staffs;
- (2) ~~t~~The members of the Atomic Safety and Licensing Appeal Panel and staff assistants to the Panel;
- (3) ~~t~~The members of the Atomic Safety and Licensing Board Panel and staff assistants to the Panel;
- (4) ~~a~~A presiding officer appointed under § 2.704, including an administrative law judge, and staff assistants to a presiding officer;
- (5) ~~s~~Special assistants (as defined in § 2.772);

- (6) †The General Counsel, the Solicitor, the Deputy General Counsel for Licensing and Regulation, and employees of the Office of the General Counsel under the supervision of the Solicitor or the Deputy General Counsel for Licensing and Regulation;
- ~~(7) -- the Director of the Office of Policy Evaluation and employees of that office;~~
- (87) the Secretary and employees of the Office of the Secretary; and
- (98) Any other Commission officer or employee who is appointed by the Commission, the Secretary, or the General Counsel to participate or advise in the Commission's consideration of an initial or final decision in a proceeding. Any ~~such~~ other Commission officer or employee who, as permitted by § 2.781, participates or advises in the Commission's consideration of an initial or final decision ~~on a certifying basis~~ in a proceeding must be appointed as a Commission adjudicatory employee under this paragraph and the parties to the proceeding must be given written notice of ~~such~~ the appointment.

\* \* \* \* \*

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"Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

\* \* \* \* \*

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"Investigative or litigating function" means --

- (1) pPersonal participation in planning, conducting, or supervising an investigation; or
- (2) pPersonal participation in planning, developing, or presenting, or in supervising the planning, development or presentation of testimony, argument, or strategy in a proceeding.

~~Subpart-6-[Removed]~~

~~5r---Part-2-is-amended-by-removing-Subpart-6r~~

§ 2.719 [Removed]

~~6f.~~ Section 2.719 is removed.

76. Part 2 is amended by revising the undesignated centerhead immediately after § 2.772 to read as follows:

#### RESTRICTED COMMUNICATIONS

87. Section 2.780 is revised to read as follows:

§ 2.780 Ex parte communications.

In any proceeding under this subpart --

- (a) Interested persons outside the agency may not make or knowingly cause to be made to any Commission adjudicatory employee, any ex parte communication relevant to the merits of the proceeding.
- (b) Commission adjudicatory employees may not request or entertain from any interested person outside the agency or make or knowingly cause to be made to any interested person outside the agency, any ex parte communication relevant to the merits of the proceeding.
- (c) Any Commission adjudicatory employee who receives, makes, or knowingly causes to be made a communication prohibited by this section shall ensure that it and any responses ~~thereto~~ to the communication promptly are served on the parties and placed in

the public record of the proceeding. In the case of oral communications, a written summary ~~shall~~ must be served and placed in the public record of the proceeding.

- (d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Commission or other adjudicatory employee presiding in a proceeding may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of ~~such~~ the violation.
- (e) (1) The prohibitions of this section ~~are applicable~~ apply--
- (1i) ~~w~~hen a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703; or
- (2ii) ~~w~~henever the interested person or Commission adjudicatory employee responsible for the communication has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703.



- (2) The prohibitions of this section cease to apply to ex parte communications relevant to the merits of a full or partial initial decision when, in accordance with § 2.786, the time has expired for Commission review of the Atomic Safety and Licensing Appeal Board's decision on the full or partial initial decision.
- (f) The prohibitions in this section do not apply to --
- (1) ~~Requests~~ for and the provision of status reports;
  - (2) Communications specifically permitted by statute or regulation;
  - (3) Communications made to or by ~~members of~~ Commission adjudicatory employees in the Office of the General Counsel regarding matters pending before a court or another agency; and
  - (4) Communications regarding generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated ~~by the Commission adjudicatory employee or the interested person~~ with the resolution of any proceeding under this subpart pending before the NRC.

98. New § 2.781 is added to read as follows:

§ 2.781 Separation of functions.

(a) In any proceeding under this subpart, any NRC officer or employee engaged in the performance of any investigative or litigating function in that proceeding or in a factually related proceeding may not participate in or advise a Commission adjudicatory employee about the initial or final decision on any disputed issue in that proceeding, except --

(1) ~~a~~As witness or counsel in the proceeding;

(2) ~~¶~~Through a written communication served on all parties and made on the record of the proceeding; or

(3) ~~¶~~Through an oral communication made both with reasonable prior notice to all parties and with reasonable opportunity for all parties to respond.

(b) The prohibition in paragraph (a) of this section does not apply to --

(1) ~~C~~ommunications to or from any Commission adjudicatory employee regarding --

- (i) ~~t~~The status of a proceeding;
  - (ii) ~~m~~Matters with regard to which ~~such~~ the communications specifically are permitted by statute or regulation;
  - (iii) ~~a~~Agency participation in matters pending before a court or another agency; or
  - (iv) ~~g~~Generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated by the Commission adjudicatory employee or the NRC officer or employee performing investigative or litigating functions with the resolution of any proceeding under this subpart pending before the NRC.
- (2) Communications to or from Commissioners, members of their personal staffs, ~~the-General-Counsel-and~~ Commission adjudicatory employees ~~of~~ in the Office of the General Counsel, ~~the-Director-of-the-Office-of-Policy-Evaluation-and-employees-of-that-office,~~ and the Secretary and employees of the Office of the Secretary, regarding --

- (i) ~~4~~Initiation or direction of an investigation or initiation of an enforcement proceeding;
  - (ii) ~~s~~Supervision of agency staff to ensure compliance with the general policies and procedures of the agency;
  - (iii) ~~s~~Staff priorities and schedules or the allocation of agency resources; or
  - (iv) ~~g~~General regulatory, scientific, or engineering principles that are useful for an understanding of the issues in a proceeding and are not contested in the proceeding~~t~~.
- ~~(v) -- the need to add issues to a proceeding after rendition of the initial decision or~~
- ~~(vi) -- the need to reopen a proceeding after rendition of the initial or final decision.~~
- (3) None of the communications permitted by paragraph (b)(2)(i)-(iii) of this section is to be associated by the Commission adjudicatory employee or the NRC officer or employee performing investigative or litigating

functions with the resolution of any proceeding under this subpart pending before the NRC.

- (c) Any Commission adjudicatory employee who receives a communication prohibited under paragraph (a) of this section shall ensure that it and any responses ~~thereeto~~ to the communication are placed in the public record of the proceeding and served on the parties. In the case of oral communications, a written summary ~~shall~~ must be served and placed in the public record of the proceeding.
- (d) (1) The prohibitions in this section ~~are-applicable~~ apply--
- (1i) ~~When~~ a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703; ~~or~~
- (2ii) ~~Whenever~~ an NRC officer or employee who is or has reasonable cause to believe he or she will be engaged in the performance of an investigative or litigating function or a Commission adjudicatory employee has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703.
- (2) The prohibitions of this section will cease to apply to the disputed issues pertinent to a full or partial initial

decision when, in accordance with § 2.786, the time has expired for Commission review of the Atomic Safety and Licensing Appeal Board's decision on the full or partial initial decision.

- (e) Communications to, from, and between Commission adjudicatory employees not prohibited by this section may not serve as a conduit for a communication that otherwise would be prohibited by this section or for an ex parte communication that otherwise would be prohibited by § 2.780.
  
- (f) If an initial or final decision is stated to rest in whole or in part on fact or opinion obtained as a result of a communication authorized by this section, the substance of the communication must be specified in the record of the proceeding and every party must be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert the fact or opinion prior to the filing of the decision, a party may controvert the fact or opinion by filing an appeal from an initial decision, or a petition for reconsideration of a final decision that clearly and concisely sets forth the information or argument relied on to show the contrary. If appropriate, a party may be afforded the opportunity for cross-examination or to present rebuttal evidence.

9. Appendix A to Part 2 is amended by revising paragraph (c) of section VII and paragraph (c) of section IX to read as follows:

Appendix A - Statement of General Policy and Procedure:  
Conduct of Proceedings for the Issuance of Construction  
Permits and Operating Licenses for Production and Utilization  
Facilities for Which a Hearing Is Required Under Section 189A  
of the Atomic Energy Act of 1954, As Amended\*

\* \* \* \* \*

~~10. In § VII of Appendix A to Part 2, paragraph (c) is revised to read as follows:~~

VII. General

\* \* \* \* \*

(c)(1) Section 2.781 specifies when consultation between Commissioners or boards, on the one hand, and the staff, on the other hand, is permitted in licensing proceedings conducted under Subpart G. Section 2.781 also permits a board, in the same type of proceeding, to consult with members of the panel from which the members of the board are drawn.

(2)---The provisions of § 2.781 restricting intraagency consultations and communication are not applicable to matters certified to the Commission or to the Atomic Safety and Licensing Appeal Panel under the Commission rules in §§ 2.720(h) and 2.744(e) since these matters are not deemed to involve substantive matters at issue in a proceeding on the record.

\* \* \* \* \*

11---in § IX of Appendix A to Part 2, paragraph (e) is revised to read as follows:

IX. Licensing Proceedings Subject to Appellate Jurisdiction of Atomic Safety and Licensing Appeal Board.

\* \* \* \* \*

- (c) Consultation between members of the Atomic Safety and Licensing Appeal Board for a particular proceeding and the staff is permitted on the conditions specified in 10 CFR 2.781. However, members of the atomic safety and licensing boards for particular proceedings shall may not consult on any ~~fact~~ disputed issue in those proceedings with members of the Appeal Panel.



\* \* \* \* \*

Dated at Washington, D.C., this \_\_\_\_ day of \_\_\_\_\_, 1988.

For the Nuclear Regulatory Commission.

\_\_\_\_\_  
SAMUEL J. CHILK,  
Secretary of the Commission.